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No. 18-1398

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1980

John Doe and Mary Doe,
Petitioners

v.

William Goldman, Halim Mitry, Theodore I. Anderson, Wilfred Bloomberg, Jack Ewalt, Axel Hoffer, and John Nelson,
Respondents

Petition for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR THE WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in affirming a judgment dismissing this action upon the ground that the state's three-year period of limitation for

certain tort and contract actions barred an action under 42 U.S.C. §1983, where the defendants' final refusal to disclose a minor's mental health treatment records to her parents occurred in 1974, and the action for damages stemming from that refusel was commenced in 1979?

Additional Statutes Involved

Massachusetts General Laws

Chapter 123, §10

(a) Pursuant to departmental regulations on admission procedures, the superintendent may receive and retain on a voluntary basis any person providing the person is in need of care and treatment and providing the admitting facility is suitable for such care and treatment. The application may be made (1) by a person who has attained the age of sixteen, (2) by a parent or guardian of a person on behalf of a person under the age of eighteen years .... The superintendent may discharge any person admitted under the provisions of this paragraph at any time he deems such discharge in the best interest of such person,

provided, however, that if a parent or guardian made the application for admission, fourteen days notice shall be given to such parent or guardian prior to such discharge.

...

Chapter 123, §11

Any person retained in a facility under the provisions of paragraph (a) of section ten shall be free to leave such facility at any time, and any parent or guardian who requested the admission of such person may withdraw such person at any time, upon giving written notice to the superintendent. The superintendent may restrict the right to leave or withdraw to normal working hours and weekdays and, in his discretion, may require persons or the parents or guardians of persons to give three days written notice of their intention to leave or withdraw. Where persons or their parents or guardians are required to give three days notice of intention to leave or withdraw, an examination of such persons may be conducted to determine their clinical progress, their suitability for discharge and to investigate other aspects of their case including their legal competency and their family, home or community situation in the interest of discharging them from the facility. Such person may be retained at the facility beyond the expiration of the three day notice period if, prior to the expiration of the said three day notice period, the superintendent files with the district court a petition for the commitment of such person at the said facility.

Chapter 223A, §3

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's

(a) transacting any business in this commonwealth;

(b) contracting to supply services or things in this commonwealth;

(c) causing tortious injury by an act or omission in this commonwealth;

(d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;

...

Chapter 223A, §4

When the exercise of personal jurisdiction is authorized by this chapter, service may be made outside this commonwealth.

St. 1970, c. 888, §4, inserting G.L. c. 123, §36

Section 36. The department shall keep records of the admission, treatment and periodic review of all persons admitted to facilities under its supervision. Such records shall be private St. 1970, c. 888, §4, continued and not open to public inspection except (1) upon proper judicial order whether or

not in connection with pending judicial proceedings, (2) that the commissioner may allow the attorney of a patient or resident to inspect records of said patient or resident if requested to do so by the attorney, and (3) that the commissioner may permit inspection or disclosure when in the best interests of the patient or resident as provided in the rules and regulations of the department. This section shall govern the patient records of the department notwithstanding any other provision of law.

Statement of the Case

Prior Proceedings

Plaintiffs, proceeding pseudonymously, commenced this action in February, 1979, in the United States District Court for the District of Massachusetts. In March, the defendants responded with a motion to dismiss pursuant to Fed. R. Civ. Proc. Rule 12 (b)(1) and 12(b)(6). Plaintiffs countered with a motion for summary judgment on the issue of liability, reserving

damage issues for jury trial. The motions were submitted to the court without oral argument. On May 20, 1980, the court (Mazzone, J.) granted defendants' motion to dismiss, and subsequently denied plaintiffs' Motion to Vacate the Judgment.

Plaintiffs appealed the judgment, and on November 3, 1980, the Court of Appeals (Aldrich, Campbell & Bownes, JJ.) affirmed the judgment with an unpublished per curiam opinion. The court denied plaintiffs' Petition for Rehearing on November 19, 1980. Plaintiffs filed their petition for a writ of certiorari on February 17, 1981.

Statement of Pertinent Facts

As defendants will argue, the only question before the Court is the correctness of the judgments of the courts.

below that this action is barred by the applicable state period of limitation. The facts pertinent to that question (together with background facts) are alleged as follows:

John Doe, an attorney, is the father of one Jane Doe, who was born in April, 1959. Mary Doe is John's second wife and Jane's stepmother, as well as her mother by adoption. (R. 28).[1/]

In June, 1972, when Jane was thirteen, her father voluntarily admitted her to the Massachusetts Mental Health Center in Boston. The "Chief Executive" of the Mental Health Center during the times in issue was defendant Halim

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1/ "R" in this case refers to the Appendix submitted by plaintiffs to the court of appeals, which has been transmitted to this Court.

Mitry. (R.10). Jane remained as a resident in the Center until January 17, 1973, and she returned for one day on March 9, 1973. Her father was billed for the cost of treatment. (R.11).

Between May, 1973, and November, 1974, John Doe made increasingly comprehensive demands upon the Mental Health Center for information about his daughter's condition, treatment, and prognosis. (R. 12-23). Meetings with staff and Dr. Mitry's written summary of Jane's outlook proved unsatisfactory to him, and from July 18, 1973, onward, Mr. Doe demanded a "comprehensive and complete report" of the Center's "findings, diagnosis, treatment and prognosis," or the records themselves. (R. 14, 17).

In June, 1974, the General Court of the Commonwealth enacted a statute giving a right of access to patient records to the patient's attorney. St.

1974, c. 348, amending G.L. c. 123, §36. Thereafter, Mr. Doe invoked this provision, as well as his parental rights, in communications with the Center. Nevertheless, Dr. Mitry refused to permit Mr. Doe to inspect the records, and Mr. Goldman, then the Commissioner of Mental Health, confirmed this decision on November 14, 1974. (R. 20, 22-23).

On November 27, 1974, Mr. Doe filed a complaint for declaratory and mandatory relief in the Supreme Judicial Court for Suffolk County.[2/] (R.9). The parties

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2/ The Court for Suffolk County is the single justice session of the Supreme Judicial Court for the Commonwealth. As a matter of practice, original actions in the Supreme Judicial Court are brought to a single justice for determination whether there is a factual dispute, and for assembly of a record upon which the case can be submitted to the full court.

submitted an agreed statement of facts for the purposes of that action, and the case was reported for decision by the full court. In May, 1977, the court issued its judgment and an opinion holding that the Commissioner of Mental Health must release records to a patient's attorney if the patient validly consents to such disclosure. However, since the validity of the original consent was disputed, and since Jane had attained her majority, the court declined to require disclosure in this case unless she executed a new consent form. The court also declined to pass on constitutional questions raised by the plaintiff. Doe v. Commissioner of Mental Health, 372 Mass. 534, 535 n.1, 537-38, 362 N.E. 2d 920, 921 n. 1 (1977).

Plaintiffs commenced this action in February, 1979, by filing a complaint in

the district court. In addition to the allegations summarized above, the complaint concatenates multiple disparate injuries which are alleged to have flowed from defendants' refusal to release Jane's records. Some of these injuries allegedly occurred in 1974 or 1975 (R. 24-34, 37-39). Some, including a complete cessation of communications with Jane, allegedly occurred in 1977. (R. 35-36). The remaining alleged injuries are not fixed in time. (R. 43, 44).

Summary of the Argument

The court of appeals affirmed the judgment of the district court solely on the ground that the action was barred by the applicable period of limitations. Other issues are not properly before this Court.

On the facts in the record, there was no support for the claim that the limitation period was tolled by reason of two defendants' residency out of state. Since under state law petitioners bore the burden of adducing facts to support the claim, and since the complaint contained allegations supporting the statute of limitations defense, judgment properly entered for the defendants.

There was no abuse in refusing to vacate the judgment and to remand the

case for factual development of the tolling claim, where the claim was not raised until the Petition for Rehearing in the court of appeals, because the statute of limitations defense was unmistakably raised by the respondents in the district court. Moreover, even if the petitioners could show respondents' out-of-state residency during the period of limitation, the period would not be tolled. Under decisions by the Supreme Judicial Court, out-of-state residency tolls the statute only if state courts cannot obtain personal jurisdiction over a defendant. In this case, respondents could have been served anywhere in the United States at any time after the cause accrued by virtue of the state's long-arm statute and Fed. R. Civ. Proc. Rule 4(e).

On the allegations in the complaint, petitioners asserted their alleged parental rights of access to their daughter's treatment records, and were finally and unequivocally refused, by November 14, 1974, at the latest. Thus, there was no error in the judgment that the case had accrued by that date.

There is no merit, factual or legal, in the argument that the cause did not accrue until petitioner had sustained the harm for which they now seek damages. Assuming that, under state law, the cause would not accrue until the injury was or should have been discovered, the instant action accrued when petitioners asserted their parental rights and were denied access to Jane's records.At that point petitioners knew or believed that rights secured by the constitution had been

abridged. Moreover, by their own allegations, they had sustained injuries to their relationship with their daughter of a kind similar to injuries which, they allege, they sustained later. In any event, the discovery rule would not be applied to a case like this, in which the alleged breach of duty was not inherently or practically unknowable.

The argument that a cause accrues under state law only when there is an injury is irrelevant because the actionable injury, if any, was the alleged deprivation of petitioners' constitutional rights, which occurred no later than November, 1974.

The lower courts properly rejected petitioners' claim that their action was governed by a twenty-year period applicable to actions to recover for support of inmates in state institutions. Even

if petitioners' action is contractual in nature, the applicable statute is that governing actions in contract for personal injuries.

If the writ issues, it should be limited to the question actually decided by the court of appeals. Respondents have argued that this action is precluded by the previous state court judgment. Since that argument depends on the proper interpretation of the state court decision, it should be considered first by the lower courts.

Moreover, the petitioners' rights also depend upon their relationship with the respondents, and the relationship depends on questions of state law which should be addressed first by the lower courts.

Argument

I. THE PETITION PROPERLY PRESENTS ONLY THE QUESTION WHETHER THE ACTION IS TIME-BARRED

The Court of Appeals decided but one issue, viz., whether this action is barred by the applicable period of limitation. Nevertheless, the petition purports to present the question whether the complaint states a claim upon which relief can be granted, an issue which was presented to, but not decided by the Court of Appeals. Plainly, if this action is time-barred, it is unnecessary to reach the merits of the complaint. If this action is not time-barred, the Court should not reach the merits until the court of appeals has had an opportunity to pass upon them. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132,

163-64 (1975); cf. Supreme Court Rule 18. While this rule is one of discretion, there is nothing in this case, as respondents will show more fully in Argument III, which calls for an exception.

II. NO SPECIAL OR IMPORTANT ISSUE MERITTING REVIEW BY THIS COURT IS RAISED BY THE DECISION BELOW

Petitioners' objections to the judgment below attack the choice of the applicable period of limitation, the conclusion that their action accrued no later than November, 1974, and the rejection of the claim that the period was or might have been tolled. Respondents will discuss these objections in the order of apparent seriousness.

A. The Court Properly Rejected Petitioners' Belated Tolling Argument.

Respondents unmistakably raised the statute of limitations as a defense in their Motion to Dismiss. (R. 69). The district court unmistakably sustained the defense. (R. 93-94). Nevertheless, petitioners did not plead, submit evidence, or argue that the period was tolled until their Petition for Rehearing in the court of appeals. At that time they noted that service of process on two of the seven defendants had been accomplished out of state, and argued an inference that those defendants had been out of state during the period of limitation.[3/]

3/ Petitioners frankly admit that they do not know whether any of the defendants resided out of state while the limitation period was running. Petition at 59.

The court of appeals denied the Petition for Rehearing because on the record the tolling argument could not be sustained. Under Massachusetts law,

> The burden of proof was on the plaintiff to show residence of the defendant out of the Commonwealth of such character that the time thereof is to be deducted in computing the period of limitation.

Ford v. Rogovin, 289 Mass. 549, 553, 194 N.E. 719, 723 (1935). See Molinar v. Western Elec. Co., 525 F.2d 521, 531 n.6 (1st Cir.), cert. denied, 424 U.S. 978 (1975). Evidence that defendants were served out of state over a year after the period had run is not sufficient to raise an issue concerning whether the period was tolled, see Ford v. Rogovin, 289 Mass. at 554, 194 N.E. at 723, and so the court of appeals held.

Petitioners requested in the alternative that the court vacate the judgment and remand the case, so that they might have the opportunity to make discovery and to introduce evidence showing that the period of limitation was tolled. The court refused to grant the request. Petitioners now argue that they were entitled to that consideration under Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 334-35 (1971).

Zenith Radio does not support petitioners' claim for at least three reasons. First, the petitioners here were "unambiguously called upon to submit a formal plea" raising the tolling claim by the Motion to Dismiss. See id. at 334. Yet they neglected to raise the issue until after the court of appeals had rendered judgment affirming the

dismissal. Second, there is no suggestion that the court of appeals declined to consider the merits of petitioners' tolling claim on the record before it. Compare Id. The problem here was that the record contains no evidence to support the claim. Thus, even granting petitioners the consideration given the plaintiffs in Zenith Radio, the tolling claim was properly rejected.

If Zenith Radio could be read to support the proposition that a case should be opened to permit proof that the period of limitations was tolled, that course would still be inappropriate here, because, as a matter of state law, the tolling statute would not apply under any circumstance suggested by the petitioners. In Walsh v. Ogorzalek, 372 Mass. 271, 274, 361 N.E. 2d 1247, 1250 (1977), the Supreme Judicial Court

construed G.L. c. 260, §9, the tolling statute upon which petitioners rely, to refer only to "a person who by reason of nonresidence is beyond the jurisdiction and process of the court." (Emphasis supplied). Since 1968, Massachusetts has had a statute conferring personal jurisdiction on the courts of the Commonwealth over persons:

> a) transacting any business in this commonwealth;
>
> b) contracting to supply services or things in this commonwealth;
>
> c) causing tortious injury by an act or omission in this Commonwealth;
>
> ...

G.L. c. 223A, §3, inserted by St. 1968, c. 760. Pursuant to G.L. c. 223A, §4, service may be made outside the commonwealth whenever the courts are authorized to exercise jurisdiction. Thus, whether petitoners' case be characterized as

sounding in tort or contract, they could have served process upon the defendants anywhere in the United States at any time between 1973 and the present. Accordingly, even if the defendants were nonresidents for some period of time between 1974 and 1979, that fact would not have tolled the running of the limitations period. Walsh v. Ogorzalek, 372 Mass. at 274, 361 N.E. 2d at 1250. Accord, Woodcock v. American Investment Co., Mass. Adv. Sh. (1978) 2287, 2296 & n.8, 380 N.E. 2d 624, 628 & n.8 (1978) (action in tort barred because filed more than two years after effective date of long-arm statute).[4/]

4/ The same result would obtain if one looked to the availability of nationwide process in federal court. For, Rule 4(e) of the Federal Rules of Civil Procedure allows service of process on out of state defendants in any manner authorized by the law of the forum state.

For these reasons, there was no error in overruling petitioners' tolling claim, or in declining to permit them to enter a formal plea and submit proof on the tolling issue.

B. The Court Properly Applied Massachusetts Law In Ruling That The Action Accrued No Later Than November, 1974.

The Court of Appeals ruled that the cause of action in this case accrued "no later than November 14, 1974, the date of the Commissioner's final refusal of the records." In their Petition for Rehearing, petitioners requested that the court reconsider its decision on this point in light of two intervening decisions by the state Supreme Judicial Court, Franklin v. Albert, Mass. Adv. Sh. (1980) 2187, 411 N.E. 2d 458 (1980), and Teller v. Schepens, Mass. Adv. Sh.

(1980) 2199, 411 N.E. 2d 464 (1980). The court of appeals ruled that those cases did not affect its judgment.

In Franklin v. Albert, the Supreme Judicial Court ruled that a cause of action for medical malpractice accrues when the plaintiff discovers or reasonably should discover his injury. Petitioners take this ruling to refer to the injury qua consequential damages, rather than the injury qua breach of duty. Thus, they argue that their cause of action accrued on the date on which they discovered or should have discovered that they themselves had sustained some consequential damage.

It would be enough to say that the rejection of this interpretation by the court of appeals is not manifestly wrong. Supreme Court Rule 17.1(a). See Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) (Court

will not review decision concerning state law which is not in clear conflict with authoritative ruling of state court). Nevertheless, a moment's consideration of petitioners' argument will show that the court of appeals was manifestly right.

First, assuming that the so-called discovery rule adopted in Franklin v. Albert would be applied to an action like this, the cause of action would accrue when the petitioners first learned or should reasonably have learned of their injury. The injury for which petitioners seek redress is the alleged interference with rights secured by the federal constitution or laws, in this case their parental rights. The complaint, which incorporates stipulations filed in the Supreme Judicial Court, alleges that Mr. Doe asserted his rights

as a parent to have access to his daughter's treatment records in communications with the respondents in 1973 and 1974. (R.15-16). The complaint also alleges that respondents unequivocally refused to allow access; and that refusal must be taken as having become final by November, 1974, when Commissioner Goldman's letter precipitated the state court action. (R. 9, 23). Cf. Board of Regents v. Tomanio, 446 U.S. 478, 490-92 (1980) (pendency of state court action does not toll limitation period governing action under 42 U.S.C. §1983). In short, the complaint itself alleges petitioners' belief, in 1973 and 1974, that respondents were infringing their parental rights. Accordingly, accepting the applicability of the rule in Franklin v. Albert, the cause accrued no later

than November, 1974, and was barred after November, 1977.

However, it is reasonably clear that the rule established in Franklin would not be applied in a case where the breach of duty, if any, is immediately known. Both Franklin and Teller v. Schepens were cases in which the alleged breach was not reasonably knowable when it occurred. Medical malpractice, like legal malpractice, is committed out of the patient's or client's view, and is not likely to be recognized except by the injury which it causes. See Hendrickson v. Sears, 365 Mass. 83, 90, 310 N.E.2d 131, 135 (1974). Because for practical purposes the breach of duty remains unknown until the injury is discovered, the Supreme Judicial Court has ruled that the cause of action accrues when the injury is discovered.

See also Mansfield v. GAF Corp., 5 Mass. App. Ct. 551, 555, 364 N.E.2d 1292, 1295 (1977)("The discovery rule is designed to postpone the accrual date of causes of action when the defect is "inherently unknowable'"). Since the alleged breach in this case was not only knowable, but also admittedly known, there is simply no basis in policy for applying the discovery rule in this case. For this reason as well, the court of appeals correctly affirmed the judgment.

Petitioners argue that the decision in Franklin should govern this case because some at least of the injuries alleged did not occur until 1977. Thus, for instance, they allege that the loss of their relationship with Jane became irrevocable when the Supreme Judicial Court refused to give access to her treatment records. (R. 39, 43, 44). As the court of appeals pointed out, this

argument depends upon a confusion of the breach of duty with consequential damages. Moreover, an almost identical argument was flatly rejected in Mansfield v. GAF Corp., 5 Mass. App. Ct. at 555, 364 N.E.2d at 1295. (action against the installer of a roof accrued no later than the date upon which a defect, however slight, was discovered). Since petitioners allege injuries to themselves as parents antedating November 1974 (e.g., R. 24, 24, 28), the judgment of the court of appeals was required by Mansfield.[5/]

5/ Petitioners state that, in 1974, they foresaw injury to Jane but not to themselves, and that they were not injured until the Supreme Judicial Court's judgment foreclosed access to their daughter's records. Petition at 7-8, 10. If petitioners intend to argue that the cause of action under 42 U.S.C. §1983 did not accrue until they had exhausted their state court remedies, that argument is foreclosed by Board of Regents v. Tomanio, 446 U.S. 478 (1980).

It is irrelevant that damages continued to build as time passed. The actionable injury in this case was the alleged interference with petitioners' parental rights. Infringement of those rights was evidently actionable whether or not petitioners suffered serious harm. See Rzeznick v. Chief of Police of Southampton, 374 Mass. 475, 484-86, 373 N.E.2d 1128, 1134-35 (1978) (cause of action for infringement of constitutional right existed even absent substantial harm). Cf. Carey v. Piphus, 435 U.S. 247, 266-67 (1978).[6/]

6/ The court of appeals and the district court both ruled that this action would not be classified as a continuing tort under state law. Under that doctrine a new action would accrue each day the wrong -- typically, a trespass -- continued unabated. Although petitioners do not in terms challenge those judgments, their argument that the cause

(footnote continued)

C. The Court of Appeals Properly Applied A Three-Year Period of Limitation.

Petitioners argue that their action is governed by the twenty-year period of limitation for "Actions under section ninety-six of chapter one hundred twenty-three [of the General Laws] to recover for the support of inmates in state institutions." See G.L. c. 260, §1. It is a sufficient answer to this argument that petitioners' action is not one to recover for the support of inmates. To

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footnote continued

accrues when some substantial harm occurs in practically equivalent to a continuing tort theory. The argument thus runs against settled law as found by the court of appeals. It also contravenes any federal policy of repose. See, e.g., William v. Walsh, 558 F.2d 667, 673-75 (2d Cir. 1977).

the extent that petitioners assert rights that are contractual in nature, their action is governed by G.L. c. 260, §2A ("actions of contract to recover for personal injuries ... shall be commenced only within three years next after the cause of action accrues"), or G.L. c. 260, §4 ("Actions of contract ... for malpractice, error or mistake ... shall be commenced only within three years next after the cause of action accrues").

Respondents do not mean to concede that this action is contractual in nature. First, it is plain that any contract was with the Center rather than the defendants. Second, when Jane entered the Center, it was settled law that neither she nor her parents had a right of access to her treatment records. St. 1970, c. 888, §4; Bane v. Superintendant of Boston State Hospital, 350 Mass. 637, 216 N.E. 2d 111 (1966).

Moreover, to the extent that petitioners may now rely on statutory rights, their action sounds in tort. See Graffals v. Garcia Santiago, 550 F.2d 687, 688 (1st Cir. 1977); Kozan v. Comstock, 270 F.2d 839, 844-45 (5th Cir. 1959). The period of limitations for such tort actions is three years. G.L. c. 260, §2A.

III. THE PETITION SHOULD BE DENIED WITH RESPECT TO ISSUES NOT DECIDED BY THE COURT OF APPEALS.

If the Court decides to issue the writ of certiorari to the court of appeals, it should limit the issues to be decided to those fairly comprised in the decision by the court of appeals. See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 163-64(1975). While the claim that respondents infringed petitioners' parental rights has superficial appeal, the case is not of such "imperative

public importance" that the Court should hear it before the court of appeals has had an opportunity to render its judgment. Cf. Supreme Court Rule 18. On the contrary, this action simply seeks compensation for past wrongs which are, by petitioners' averments, now irreparable.

Moreover, the petitioners' claim may be precluded by the state court judgment. Although the Supreme Judicial Court expressly declined to reach constitutional issues, those issues, as well as a claim for damages, were raised by Mr. Doe in the case. See Doe v. Commissioner, 372 Mass. 534, 535n.1, 538, 362 N.E. 2d 920, 921n.1, 922 (1977). As petitioners allege, the case was reported for decision on an agreed statement. (R.5). The record did not contain adequate support for Mr. Doe's claim for

damages. 372 Mass. at 538, 362 N.E. 2d at 922. Thus, the only question presented was whether Mr. Doe was entitled to prospective relief. Since Jane had attained her majority, Mr. Doe's parental rights as of the date of the judgment were not in issue.7/

On these facts, petitioners' action may be precluded by the previous state court judgment, even though the state court did not address the present issues, because Mr. Doe chose to abandon those claims in the course of the state court action. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327-28 (1979);

7/ More accurately, the Supreme Judicial Court must have decided implicitly that Mr. Doe's rights as a parent, if any, to see his daughter's records ceased when she became an adult. Petitioners appear to agree with this point. Petition at 11.

Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103, 1107-09 (1st Cir. 1978); Lovely v. Laliberte, 498 F.2d 1260, 1263 (1st Cir. 1974). Since Mary Doe's claim depends exclusively upon the facts alleged in state court, her claim should likewise be precluded. See Jess v. Great Northern Ry., 401 F.2d 535, 536 (9th Cir. 1968); Stickney v. E.R. Squibb & Sons, Inc., 377 F. Supp. 785, 788 (M.D. Fla. 1974); Note, Collateral Estoppel of Nonparties, 87 Harv. L. Rev. 1485, 1501-04 (1974). Respondents submit that the court of appeals and district court should be permitted to address this question before the petitioners' substantive claim is decided.

In addition, the Court should not hear petitioners' constitutional claim before the lower courts have addressed it because it is by no means clearly

presented on the allegations in the complaint. For instance, there is no element of state coercion in this case. Mr. Doe voluntarily committed his daughter; the commitment was terminable at will;[8/] there is no allegation of forced treatment of Jane; and there is no allegation of malpractice. Furthermore, when Mr. Doe, an attorney, committed his daughter, he had notice if not knowledge that neither he nor his daughter was entitled as of right to see her records. St. 1970, c. 888, §4; Bane v. Superintendant of Boston State Hospital, 350 Mass. 637, 216 N.E. 2d 111 (1966).

In short, the relationship between petitioners and respondents was not different in character from that between parents and a private psychiatrist whom

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8/ Voluntary commitments are governed by G.L. c. 123, §§10, 11.

they engage to treat their child.[9/] In these circumstances, it is doubtful that the Constitution speaks definitively on the issue which petitioners seek to raise. However, it is at least clear that the constitutional issue arises from a relationship ordered by state law; and the Court should not reach that issue until the court of appeals (and the district court) have had the opportunity to clarify the relationship. Huddleston v. Dwyer, 322 U.S. at 237-38.

9/ The criterion which guided respondents' treatment of Jane and disclosure of her records, was "the best interests of the patient." See G.L. c. 123, §§10, 11, 36.

Conclusion

For the reasons stated, the petition for the writ of certiorari should be denied. If the petition is granted, the Court should limit the grant to the question whether the action is barred by the applicable state period of limitations.

Respectfully submitted,

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